Petition

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

81-369

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

KENNETH R. BERRY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeal's Opinion overturning the Trial Court's finding that petitioner was denied effective assistance of counsel violate the Sixth Amendment Right to Counsel made applicable to the States by the Fourteenth Amendment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner KENNETH R. BERRY respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Fourth Appellate

District, Division One.[1/]

The Court of Appeal filed its opinion on April 16, 1981 which became final on July 1, 1981 when a Petition for Hearing to the California Supreme Court was denied.[2/]

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Section 1257(3). The Court of Appeal decision became final on July 1, 1981, when the California Supreme Court denied discretionary review. Cal.R.Ct. 25, 28.

[1/] The Court of Appeal of the State of California, Fourth Appellate District, Division One will be referred to as the "Court of Appeal".

[2/] A copy of the Court of Appeal Opinion is attached as Appendix "A". The Order from the California Supreme Court denying petitioner's hearing is attached as Appendix "B". The parties in the courts below were the People of the State of California as plaintiff, represented at trial by the District Attorney of San Diego County and on appeal by the Attorney General of California.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to...have the assistance of counsel for his defense.

The Fourteenth Amendment adds in part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Before commencement of his state court jury trial on criminal real estate fraud charges, petitioner moved to dismiss his case, or in the alternative, suppress his tape-recorded statements and their fruits, on the grounds that his prior lawyer did not competently represent him. The trial

judge factually found that under California law, petitioner was denied effective assistance of counsel (R.T.M. 227-228).[3/]

More specifically, petitioner was arrested on Saturday, October 14, 1978. He was advised of his Miranda rights and responded that he wanted to "consult with an attorney" (R.T.M. 9).

His retained counsel visited him in jail on the day of his arrest, and again the following day. His lawyer was aware of the nature of the conspiracy, grand theft, attempted grand theft and forgery charges. His counsel appeared for petitioner's arraignment on Monday, October 16, 1978 (R.T.M. 14, 127).

After the arraignment, defense counsel spent approximately two hours viewing discovery in the prosecutor's office (R.T.M. 18). About half the discovery materials were available (R.T.M. 106).

[3/] "R.T.M." designates the Reporter's Transcript of motion proceedings.

Several witness' interviews were not completed by the prosecution and no handwriting comparisons had been made. The defense did not procure independent interviews, nor expert handwriting evaluation (R.T.M. 15-19, 41). Defense counsel felt such efforts were unnecessary since Berry had told him that he had signed documents in other's names (R.T.M. 24, 57-58).

Petitioner admitted to his lawyer that he had instructed another individual to set up mail services under phony names. He told his counsel that he and his codefendant had met with a Mexican lawyer, using fictitious names to discuss the transfer of money to Mexico.

Petitioner denied criminal intent to his lawyer, pointing to the yet unarrested codefendant as the experienced real estate broker who misled him into believing there were powers of attorney authorizing the codefendant, thus petitioner at the codefendant's instruction, to sign names of

absentee landowners, selling their property (R.T.M. 24-25). Counsel believed his client lacked the mens rea necessary for the alleged law violations (R.T.M. 25).

On October 18th petitioner was still in jail. Bail was $50,000. A bail review was not scheduled until Thursday, October 19th (R.T.M. 27-28). Counsel spoke with his client about the possibility of granting an interview to the prosecutor to get bail reduced. Petitioner was interested in gaining his freedom (R.T.M. 20-21). Defense counsel made no effort to seek a reduction of the bail in the Superior or Appellate Courts (R.T.M. 27-28). The primary motive for allowing, and not discouraging, petitioner's

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jail interview, was to obtain a bail reduction (R.T.M. 20-21, 32).[4/] However, the prosecutor made no promises of benefit to petitioner in advance of the interrogation. There was no discussion of dismissal, reduced charges, bail reduction, or even that the statements would be "off the record." To the contrary, the participants knew the statements were to be "on the record" (R.T.M. 22-23, 63-64). In the presence of his counsel,

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[4/] The Court of Appeal concluded that defense counsel's "advice, strategy, is bottomed on his reliance upon petitioner's continued protestations of innocence." (Opinion, Appendix "A", p. A-16). However, defense counsel was clear in stating that the "whole purpose" for the first and most damaging of the interrogation sessions was to further a bail reduction (R.T.M. 20-21). Later in his testimony he stated bail reduction was his primary motive for allowing the questioning (R.T.M. 32). This is a difficult tactic or strategy to defend.

petitioner was again advised of his rights and waived them.[5/]

What followed on October 18th was a detailed and thorough 90-minute tape-recorded interrogation by a deputy district

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[5/] The transcript of petitioner's October 18th tape-recorded interrogation reflects the following waiver:

> "We have already explained your rights to you and you waived those rights. We were talking about that today and your counsel has agreed to that waiver. It is also your understanding, is it not, that the D.A., myself, and Mr. Waight, and any other representatives from our office or any other law enforcement agency, has not made any promises to you of any kind whatsoever?
>
> "Answer by Mr. Berry: No.
>
> "Mr. Heisner: In return for which you are now talking to us; is that your understanding, Mr. Berry?
>
> "Answer: Yes, nobody has promised me anything.
>
> "Mr. Heisner: Is that your understanding too, Mr. Thompson?
>
> "Mr. Thompson: Yes, that is my understanding, yes." (Court's Ex. 2, Page 34). [Emphasis added]. [Mr. Waight is an investigator for the District Attorney; Mr. Heisner is the prosecutor and Mr. Thompson is defense counsel].

attorney and his investigator. Petitioner admitted signing various signatures, including that of a notary. He admitted asking another to open mail services for receipt of real estate documents using false names. He admitted meeting with two attorneys under fictitious names concerning a transfer of large sums of money to Mexico. He argued his lack of intent to steal because he trusted his codefendant's representations regarding legal authority provided by a secret group of investors (Court's Ex. 2, R.T.M. 103).

This extensive interview provided the prosecutor with knowledge that petitioner had signed multiple real estate documents by writing the names of purported sellers under the belief that powers of attorney authorized him to sign their names (Court's Ex. 2). He provided names of witnesses unknown to the prosecutor (R.T.M. 68-69, 106-108). He admitted numerous meetings and discussions with his

codefendant, the experienced real estate broker who had hired him (Court's Ex. 2). He provided every legal element necessary to convict him of conspiracy, theft, attempted theft and forgery, leaving only some question about his intent to defraud. He provided investigative leads, the exact nature of his defense and incriminating evidence against his codefendant and alleged coconspirator, more than 14 months before his trial (R.T.M. 68-69, 74).[6/]

Petitioner was released on reduced bail. On November 2, 1978, he provided a second tape-recorded interview to the prosecutor, this one at the prosecutor's office. Defense

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6/ Defense counsel testified that when petitioner was first questioned on October 18th the prosecutor had little information on the codefendant. If petitioner would tell his "believable" story, they would probably go along with a bail reduction or a release on his own recognizance (R.T.M. 33, 83). A criminal complaint was not filed against the codefendant until October 20, 1978 (Case No. F56977).

counsel was again present and advised of the procedure. Unlike the first session, counsel's purpose was "to clear this matter up." (R.T.M. 41-42). Again, there were no representations of dismissal, reduction in charge, or benefit to petitioner in exchange for the interview. In fact, defense counsel never got the feeling the prosecutor was thinking about dismissal (R.T.M. 45-47). He felt the case would go to trial (R.T.M. 52).

The November 2nd interview was much like the first. The prosecutor had more documents to show petitioner than before. Petitioner pointed out what he remembered signing. It was more confronting and detailed an inquiry than the first and 15 to 30 minutes longer.

The investigator accused petitioner of continuing to lie. Defense counsel objected and threatened to terminate the interview

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unless the accusations ceased (Court's Ex. 3, Page 17).[7/]

Toward the interview's conclusion, the investigator asked petitioner how he felt about taking a polygraph. He answered:

> Mr. Berry: Polygraph? What is that?
> Mr. Waight: Lie detector test.
> Mr. Berry: It would be up to Roger Thompson.
> (Court's Ex. 3, Page 28).

Defense counsel felt that his client could probably benefit from the results. A confidential polygraph conducted within the attorney-client privilege had not been attempted (R.T.M. 48-49). Such a procedure was contemplated, but only if petitioner failed the test given by the Department of Justice (R.T.M. 99).

[7/] When the second tape-recorded interview concluded, the deputy district attorney summed it up:

> Well, I think I've pretty well exhausted everything and we appreciate your cooperation in talking with us (Court's Ex. 3, Page 46). [Emphasis added].

Defense counsel advised petitioner that if he was hiding anything he should not take such a test (R.T. 49). Counsel believed that if petitioner passed, it would be difficult for the prosecutor to continue to proceed against him (R.T.M. 56-57). These unexpressed thoughts were not shared by the deputy district attorney handling the case (R.T.M. 64-65).

Petitioner felt uncomfortable about the test and was concerned about flunking it. He was advised to take it. If he flunked it, he was told the results could not be used in court (R.T.M. 51-52, 135-136).

He took the polygraph in the prosecutor's office. It was given by a California Department of Justice polygrapher brought from Sacramento for that purpose. Defense counsel was not present. Petitioner's test results were unsatisfactory (R.T.M. 49-50, 93).

Petitioner granted the two tape-recorded interviews and the polygraph on advice of

counsel. He denied wanting to talk to the prosecutor. In fact, he did not know there was a procedure for doing so (R.T.M. 118-120). He was told that the interviews would probably produce a dismissal and that the polygraph was a step toward getting the matter cleared up (R.T.M. 51, 109).

A lawyer, qualified as an expert witness, testified that legal advice leading to the two interrogation sessions and a polygraph examination was below the standard of competency under California law (R.T.M. 144). No contrary expert opinion was proffered.

The primary reason for the expert's opinion was the absence of any significant benefit to petitioner for such Fifth Amendment privilege waivers. Bail reduction should have been pursued through judicial means. You cannot "sell a defendant down the river" just to get him out of jail he opined (R.T.M. 144-147).

Petitioner's revelations were damaging. They constituted substantial admissions and

disclosed witnesses. They deprived petitioner of his defense of silence and the opportunity to litigate on the existing weaknesses in the prosecutor's case (R.T.M. 149, 169-170). Before deciding to submit to the prosecutor's suggested polygraph, a private examination should have been conducted to determine petitioner's ability to pass such a test (R.T.M. 176).

If a defense lawyer is trying to obtain a dismissal for his client and needs certain facts communicated to the prosecutor, he should do it unless there is a guaranty that the client's communication will not be used against him in any way (R.T.M. 150, 159).

The likelihood of convincing a prosecutor that a defendant lacked mens rea in a criminal fraud case where the same defendant committed numerous acts supporting a contrary inference, despite a truthful polygraph result, is remote (R.T.M. 150, 154, 156-158). Nor can a defense lawyer speculate on some

hoped for yet unpromised benefit before he agrees to such significant waivers. Not only should he maintain a healthy skepticism regarding statements from his client, he should also act to protect a client against himself when necessary (R.T.M. 149, 151, 153).

The advice of defense counsel at the post-accusation and arrest, but pre-preliminary hearing and trial stages, was "not that conduct that could reasonably be expected of a reasonably competent attorney acting as a diligent advocate" (R.T.M. 144).

At petitioner's trial, evidence was presented of twelve transactions of similar methodology. A person sounding experienced in real estate would phone real estate offices stating interest in selling certain vacant land in North San Diego County. The caller wanted a fast cash sale.

Pertinent documents such as listing agreements, preliminary title reports, purchase contracts and deeds were mailed to mail

service addresses in care of a fictitious attorney. There was never face-to-face contact between purported seller and sales agent. Signed documents were returned by mail or messenger. The true owners, most of whom lived out-of-county, had no knowledge their land was being offered for sale. Their names were forged on the various transaction documents (R.T.T. 7-25, 44-85, 88-112, 117-140, 145, 167, 183-209, 211-216, 219-225, 258-271).[8/]

Petitioner's handwriting was identified on several documents where the signature of the seller would appear. His writing was usually connected to the female sellers, his codefendant's with the males. Some forged signatures could not be identified as made by either defendant (R.T.T. 297-309, 377-309, 377-397, 413-424).

On documents required to be notarized, the prosecution's expert was able to find

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8/ "R.T.T. refers to the Reporter's Transcript of trial testimony.

the notary's signatures bore good similarities to petitioner's writing; on others the notary's signatures were consistent with the codefendant's writing (R.T.T. 297-309, 377-395, 413-424). The California Secretary of State possessed no record indicating a notary in California with the name appearing on the documents (R.T.T. 431).

At different times three different mail services were opened at petitioner's instruction. They were listed under fictitious names. Mail was picked up there and delivered to petitioner. For his services, the messenger was to receive $200 from petitioner. On one occasion, the messenger delivered an envelope to an attorney in Mexico at petitioner's request. When the messenger was told by the attorney that there was some problem with the check, he told petitioner and petitioner responded that everything was off (R.T.T. 339-361).

The Mexican lawyer met with petitioner and his codefendant about funding investments

in Mexico. False names were used. Two escrow proceeds checks were sent to the attorney and deposited in a bank in Mexico. They failed to clear because of forged endorsements. Two transactions closed escrow, but stop-payment orders were issued before funds were paid. Reconveyances were prepared returning the property to the lawful owners (R.T.T. 29-30, 77, 317-323, 328-335).

In defense, petitioner testified he relied upon his more experienced codefendant, who was a real estate broker, who repeatedly assured him powers of attorney existed and that petitioner could sign the names indicated (R.T.T. 615). Petitioner contended he had been informed that the transactions were for the benefit of out-of-state investors desiring anonymity (R.T.T. 610).

Although the prosecution did not introduce petitioner's tape-recorded statements, they did effectively cross-examine him (R.T.T. 626-694).

The charges that went to the jury in petitioner's case were conspiracy to defraud (California Penal Code, Section 182.4), two counts of grand theft (California Penal Code, Section 487.1), seven counts of attempted grand theft (California Penal Code, Sections 664, 487.1) and five counts of forgery (California Penal Code, Section 470). Guilty verdicts were returned on all counts. In addition to a share of required restitution, petitioner was ordered confined for 18 months as a condition of supervised probation (C.T. 167).[9/] He remains free of custody on bond pending resolution of this Petition.

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[9/] "C.T." refers to Clerk's Transcript on Appeal.

REASONS FOR ALLOWANCE OF WRIT

THE COURT OF APPEAL, DISREGARDING THE SUBSTANTIAL EVIDENCE TEST IN CALIFORNIA, ERRONEOUSLY DETERMINED THAT DEFENSE COUNSEL'S CONDUCT IN ADVISING HIS CLIENT TO WAIVE PRETRIAL HIS PRIVILEGE AGAINST SELF-INCRIMINATION, MAKE DAMAGING ADMISSIONS TO THE STATE, PROVIDE LEADS TO DEFENSE WITNESSES, DISCLOSE HIS DEFENSE, AND IMPAIR HIS ABILITY TO DEFEND AT TRIAL, WAS WITHIN THE ZONE OF EFFECTIVE ASSISTANCE OF COUNSEL

Alexander Solzhenitsyn said in The Gulag Archipelago (1973), 121, "[i]t seems a virtual fairy tale that somewhere, at the ends of the earth, an accused person can avail himself of a lawyer's help. This means having beside you in the most difficult moment of your life a clear-minded ally who knows the law."

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel for his defense." That right accrues as soon as adversary proceedings have begun. Massiah v. United States, 377 U.S. 201, 204 (1964);

Brewer v. Williams, 430 U.S. 387, 398 (1977) and People v. Dorado, 62 Cal.2d 338, 348 (1965). This critical stage is reached, not necessarily when charges are filed, but when the investigation focuses on an individual who has been taken into custody. Escobedo v. Illinois, 378 U.S. 478, 490-491 (1964) and People v. Dorado, supra at 344.

Miranda v. Arizona, 384 U.S. 436, 444-445 (1966) made it clear that as part of the Fifth Amendment privilege against self-incrimination, questioning a suspect must cease if he "indicates in any manner and at any stage of the process that he wishes to consult with an attorney."

Since custodial interrogation may have an unalterable effect on a defendant's subsequent trial, such a critical stage requires the "guiding hand" of counsel. Escobedo v. Illinois, supra at 485; Miranda v. Arizona, supra at 470; and People v. Dorado, supra at 349.

What happens during interrogation can certainly affect the entire trial. Hamilton v. Alabama, 368 U.S. 52, 54 (1961). Important rights can be "irretrievably lost," as they are when an accused represented by counsel waives a right for strategic purposes. People v. Dorado, supra at 348.

It has been determined that "a substantial portion of the obligation counsel owes is not directly connected with the trial but involves investigation and advice at pretrial and post-trial stages. (See generally, ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) pp. 147-148, 225-228." People v. Pope, 23 Cal.3d 412, 423 (1979). [Emphasis added].

The question of the adequacy of defense counsel in California is determined by looking to the Sixth Amendment right to counsel and Article I, Section 13 of the

California Constitution. People v. Pope, Id. at 422 and People v. Nation, 26 Cal.3d 169, 178 (1980).[10/]

This important constitutional right was intended to secure for a defendant "all the benefits which may flow from the employment of counsel." People v. Pope, supra at 422, fn.12 and People v. Avilez, 86 Cal.App.2d 289, 294 (1948).

The California test is that an accused must establish that counsel "acted or failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, petitioner must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." People v. Pope, supra at 425. [Emphasis added].

[10/] Article I, Section 13 of the California Constitution provides in pertinent part that, "[i]n criminal prosecutions, in any court whatever, the party accused shall have the right...to appear and defend, in person and with counsel."

Quoting Beasley v. United States, 491 F. 687, 693-694 (6th Cir. 1974), Chief Justice Bird wrote:

> The right is denied if trial counsel makes a critical tactical decision which would not be made by diligent, ordinarily prudent lawyers in criminal cases. This is true even if the decision were not made from ignorance of the law or of fact. People v. Pope, supra at 424. [Emphasis added].

Among the duties listed for diligent counsel are the "duty to investigate carefully all defenses of fact and of law that may be available to the defendant" and that "[c]ounsel should promptly advise his client of his rights and take all actions necessary to preserve them...." People v. Pope, supra at 425. [Emphasis added].[11/]

[11/] Reference was made to the ABA Defense Standards as a guide to determining reasonable competence. Standard 3.6 and the collateral commentary mandate prompt protection of legal rights including the privilege against self-incrimination and utilization of motions seeking pretrial release of the accused. The duty of prompt investigation reported in Standard 4.1 "exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt...."

The Sixth Amendment right to effective assistance of counsel is the same whether the lawyer is appointed or retained. The client, whether poor or not, is entitled to constitutionally adequate legal assistance. People v. Cooper, 24 Cal.3d 672, 681 (1979) and People v. Frierson, 25 Cal.3d 142, 161-162 (1979).[12/]

The current federal standard on effective assistance of counsel was set forth in McMann v. Richardson, 397 U.S. 759, 771 (1970). The Court stated that the competence and effectiveness of counsel is judged by whether the advice received falls "within the range of competence demanded of attorneys in criminal cases."

The advice given must be reasonably

12/ On competency grounds, the failure to investigate is not new, In re Williams, 1 Cal.3d 168, 175 (1969); nor is the failure to object to evidence. People v. Nation, supra at 180 and People v. Farley, 90 Cal.App.3d 851, 865 (1979); or the failure to raise a meritorious defense. People v. Pope, supra at 428.

competent. Unlike the situation in California, the federal courts do not require that the incompetence of defense counsel result in the withdrawal of a potentially meritorious defense from consideration. All that is required is that defendant demonstrate that the defense provided to him was inadequate; no specific prejudice need be shown. Cuyler v. Sullivan, 100 S.Ct. 1708, 1719 (1980).

An interpretation of just what is meant by "reasonably competent" is provided in Beasley v. United States, supra at 696. "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."

Petitioner contends that California's standard for effective assistance of counsel is too narrowly drawn if it excludes the type of conduct complained of here. The

California rule that the error or omission must withdraw a potentially meritorious defense leaves without remedy those forms of attorney conduct which do not withdraw a traditional defense like insanity, diminished capacity, alibi, self-defense, etc., but yet directly enhance the state's ability to convict the accused. This should not be.

A defense lawyer's decision to allow the prosecution access to his client for interrogation should never be a blind adventure. Here, there was no bargained protection or offered benefit to make such a significant Fifth Amendment waiver even potentially worthwhile. Certainly the primary purpose for which the waiver was granted —— a possible but unpromised bail reduction —— was shortsighted and indefensible.

When there is a carefully negotiated quid pro quo —— information in exchange for significant benefit to the accused ——

cooperation with the prosecutor by a defendant can be a viable option. This is especially true in cases involving codefendants or alleged coconspirators where little may be known about more culpable suspects.

In the hands of a careful lawyer, a defendant's information, properly communicated, can result in a dismissal or substantially reduced charges. The important concept here is that even in the context of offered information from the accused to the prosecution, the defense lawyer has a duty to protect his client. This duty includes discussing with the prosecutor specific and meaningful benefits to the client in exchange for information. The lawyer can act as a "go-between" in communicating this information. There can be, and frequently are, agreements concerning confidentiality and non-exploitation of the communicated facts if the prosecutor decides that the value or credibility of the information is not worth the price.

Here there was absolutely no protection sought or obtained for the client. The prosecutor had everything to gain and nothing to lose by tape recording lengthy admissions in two separate sessions. The defense lawyer got for his client what he bargained for —— nothing. Contrary to the position stated by the Court of Appeal, conditioned promises of leniency are not unusual. They are worked out before a defendant submits to government interviews.

We have here an accused, obviously in custody, clearly asserting his right to counsel, getting poor legal advice and waiving his privilege against self-incrimination to his detriment. The prosecutor did nothing illegal or unethical to bait the trap. He simply took advantage of a lawyer's mistake in judgment. The effect on petitioner's ability to get a fair trial down the road is the same as if the statements were obtained in violation of

the right to counsel or the privilege against self-incrimination. It does not matter who caused the problem if the result is unfairness. Deprivation of the right to counsel which leads to a conviction automatically involves state action. See People v. Nation, supra at 178, and Waltz, Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U.L. Rev. 289, 297-299 (1964).

Without question petitioner lightened the prosecutor's burden of convicting him. On advice of counsel he made damaging forgery admissions; he provided investigative leads in the names of witnesses; he described his "power of attorney" defense in detail, and he placed himself in meeting after meeting with coconspirators —— one of whom was not yet charged. He even took the State's polygraph examination without first

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determing his ability to pass.[13] He greatly enhanced the prosecutor's arsenal for cross-examination and trial preparation.

The concept of lightening the prosecution's load in criminal cases has been addressed before in California. In Prudhomme v. Superior Court, 2 Cal.3d 320, 326 (1970), the trial court issued a discovery order which required disclosure to the prosecution of names, addresses and expected testimony of defense witnesses. The State Supreme Court said that if disclosure would conceivably lighten the prosecution's burden of proving its case in chief, then it was improper.

In Allen v. Superior Court, 18 Cal.3d 520, 526 (1976), the application of this

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[13] The question of whether counsel's act of allowing a client to submit to a polygraph given by a state examiner without first determining the client's ability to pass is a competent one has not been answered in California prior to the Court of Appeal's decision in this case. [Opinion, p. A-20-A-24]. The expert who testified at petitioner's motion hearing opined that a successful defense pre-test is essential for competent representation (R.T.M. 145, 176-177).

test was reaffirmed when a trial court sought to have defendant reveal the names of his witnesses for jury voir dire.[14/]

Petitioner respectfully disagrees with the Court of Appeal's dictum that the decision to waive his Fifth Amendment privilege was a "tactical choice made within the spectrum of reasonable competence of a trial attorney" (Opinion, p. A-20). If the choice would not have been made by "diligent, ordinarily prudent lawyers in criminal cases", then it is constitutional error (23 Cal.3d 414). The record in this case reflects that the prudent expert would not have allowed the interrogation sessions without a conditioned benefit.

[14/] The revelation of witnesses alone can provide significantly more information than the names themselves. A background investigation of these witnesses can produce details of the defense or other information useful to the prosecution such as impeachment witnesses, inconsistent statements and specific instances of other misconduct. Allen v. Superior Court, supra at 526, fn.4.

It was a matter of expert evidentiary opinion that petitioner was the recipient of ineffective assistance of counsel. No contrary opinion was offered.

Following a full evidentiary hearing involving five witnesses the trial court was asked to make a specific finding on the question of Sixth Amendment error. This is what the Court said:

> But for the record I think the only thing that is before me would indicate that there was ineffective representation of counsel to this point, and the record may so indicate for whatever purpose you might require in connection with further proceedings (R.T.M. 227-228). [Emphasis added].

With the power to determine credibility of witnesses, resolve conflicts, weigh evidence and draw inferences, all presumptions on appeal favor the trial court's findings which must be upheld if supported by substantial evidence. People v. James, 19 Cal.3d 99, 107 (1977).

Dismissal under the Court's supervisory powers is triggered "whenever the administration of justice is tainted." Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115 (1955).[15/]

Misconduct needing a cure through the application of supervisory powers "need not be so unfair or imprudent as to offend due process. McNabb v. United States, 310 U.S. 332, 340 (1943). See also In re Podesto, 15 Cal.3d 921, 938 (1976); People v. Cahan, 44 Cal.2d 434, 442 (1955) and Reynolds v. Superior Court, 12 Cal.3d 834, 845-846 (1974).[16/]

Barber v. Municipal Court, 24 Cal.3d 742, 757-758, fn.16 (1979) is helpful in

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[15/] At the motion hearing, request was made to suppress the statements and their fruits if the court felt dismissal was not appropriate (R.T.M. 201).

[16/] California Penal Code, Section 1385 provides the trial court with authority, on its own motion, to dismiss an action in furtherance of justice.

understanding the application of the dismissal remedy to those rare situations where an accused's ability to defend has been irreparably prejudiced. In Barber, an undercover police officer posed as a codefendant and attended confidential attorney-client meetings. The question of exclusion or dismissal was explored at length. The majority found that many forms of prejudice do not lend themselves to a suppression remedy.

In fact, dismissal is a well-established remedy for several different types of constitutional violations, even without a showing of prejudice. Examples are denial of a speedy trial. Strunk v. United States, 412 U.S. 434 (1973) and Moore v. Arizona, 414 U.S. 25 (1973); failure to disclose an informant who might give exculpatory evidence. Eleazor v. Superior Court, 1 Cal.3d 847 (1970) and prosecution interference in the attorney-client relationship.

People v. Moore, 57 Cal.App.3d 437 (1976).

"An exclusionary remedy is not only ineffective as a deterrant, but the problems of proof when applied to violations of the right to counsel would be inadequate to assure that the prosecution does not benefit from the illegality." Barber v. Municipal Court, supra at 759. [Emphasis added].

Lawyers defending people accused of crime need standards for their professional conduct. This is especially true in pretrial matters. As in this case, grave damage can be done to a defendant's legal position before his first evidentiary hearing. Judicially created guidelines, on a case-by-case basis, can reduce this problem.

> For criminal defendants with court-appointed lawyers or for those defendants who can beg, borrow, or steal a hundred dollars or so to pay a lawyer, the right to counsel means little more than pro forma represenation....[N]o one could seriously dispute that ineffective assistance of counsel is a common phenomenon. A very able

> trial judge described some of the counsel coming before the courts as "walking violations of the Sixth Amendment."... Bazelon, The Defective Assistance of Counsel, 42 U. Cin. L. Rev. 1, 2 (1973).

This case presents the Court with the opportunity to establish a much needed Sixth Amendment standard concerning a lawyer's duty to protect his client's privilege against self-incrimination in pretrial matters.

CONCLUSION

For the reasons articulated, the writ should issue.

Respectfully submitted,

Dated: August 20, 1981

NELSON P. BRAV
Attorney for Petitioner

APPENDIX "A"

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE
4 Crim. No. 11663
Filed April 16, 1981

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	4 Crim. No. 11663
	)	
KENNETH R. BERRY,	)	(Super. Ct.
	)	No. CR 46817)
Defendant and Appellant.	)	
	)	

APPEAL from a judgment of the Superior Court of San Diego County, Franklin B. Orfield, Judge. Affirmed.

Brav & Schwartz and Nelson P. Brav for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, Richard D.

Garske and J. Richard Haden, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kenneth R. Berry of conspiracy to defraud (Pen. Code, §182.4); two counts of grand theft (Pen. Code, §487); attempted grand theft in counts four through ten (Pen. Code, §664/487.1); forgery in counts eleven through fifteen (Pen. Code, §470). The trial court sentenced Berry to local custody, one year imprisonment on count two, and a consecutive six-month sentence on count three. Berry asserts ineffective assistance of defense counsel pretrial required dismissal of the proceedings. Berry contends his lengthy tape-recorded interrogation conducted by the deputy district attorney in the San Diego County jail, plus a follow-up recorded interrogation in the district attorney's office and a polygraph administered by the Department of Justice polygrapher were products of poor legal

advice.

The trial court, following a pretrial evidentiary hearing, generalized there was "attorney malfunction" at early stages of the prosecution but denied Berry's motion to dismiss.

FACTS - PRETRIAL MOTION TO DISMISS

Berry was arrested on multiple charges of real estate fraud. He was advised of his Miranda rights and stated he wanted "to consult an attorney." Retained counsel (Roger L. Thompson) visited him and was informed of the nature of the conspiracy, grand theft, attempted grand theft and forgery charges made. After Berry's arraignment, his counsel spent two hours viewing discovery matters in the prosecutor's office (about one-half of discovery material was then available). Several witness interviews were not completed by the prosecution and no handwriting comparisons had been done at

this point. Defense counsel did not seek independent interviews with witnesses nor his own expert handwriting evaluation.

Attorney Thompson was of the opinion such efforts were unnecessary since Berry had told him what documents he had signed in another's name. Berry admitted to his lawyer he had instructed co-defendant John Hull to set up mail services in La Jolla under phony names. He told Thompson he and co-defendant Faucher, a real estate broker, had met with a Mexican lawyer using fictitious names to transfer money to Mexico. Berry denied any criminal intent and claimed Faucher had misled him into believing there were powers of attorney authorizing Faucher, then Berry at Faucher's instructions, to sign names of absentee landowners to sell their property.

Berry was a high school graduate with about three years of college credit and

some law school training and thirty years of business experience. Thompson explained to Berry that if he were criminally involved "we don't talk to anybody." Berry assured Thompson he was completely innocent -- Faucher was responsible. He claimed he lacked knowledge or awareness that anything was wrong with the real estate transaction. In short, his claim was lack of mens rea. On several occasions Berry spoke to Thompson and professed his innocence. Based upon these protestations, Thompson concluded Berry was innocent.

Berry sought release from jail for, among other reasons, he was having difficulty with his wife. Thompson testified the deputy district attorney handling the case was reluctant to recommend an OR release unless Berry could convince him, as he had Mr. Thompson, that he was innocent and Faucher was the

real culprit. In such circumstance, the deputy district attorney would be willing to reduce bail or recommend an OR.[1] Thompson represented the alternatives to Berry and explained the pitfalls and problems in talking to the district attorney. He told his client that talking to the district attorney was "talking to the enemy."

In this factual context, Thompson permitted the district attorney to interview Berry. Thompson sought to (1) achieve a bail reduction and (2) demonstrate, through cooperation, his client's innocence. What resulted was a detailed and thorough 90-minute tape-recorded interrogation in which Berry admitted: signing various signatures, including that of grantors and notaries on deeds; having Hull open a mail service for

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[1] The deputy district attorney did not recall such a discussion.

receipt of real estate documents using false names; and meeting with two attorneys -- one from Mexico -- under fictitious names, concerning transfer of large sums of money to Mexico. Berry firmly protested his lack of intent to steal. The reason? He trusted Faucher's representations regarding legal authority provided by a secret group of investors.

Contrary to Berry's expectations, the interviews strengthened the district attorney's resolution to proceed against Berry. However, there was a reduction of the bail and Berry was released from jail.

Thompson advised Berry on several occasions he should not take a polygraph examination if he had anything to hide. However, if everything was as Berry represented, Thompson felt Berry would benefit from a polygraph; he allowed Berry to make the final decision. Berry

did take the polygraph examination and the results were unfavorable. At this point Thompson lost faith in his client. Attorney Joseph Milchen, a certified criminal law specialist and a former United States Assistant Attorney, expressed his opinion that Thompson's conduct was not that which could be reasonably expected of a reasonably competent attorney acting as a diligent advocate, giving these reasons: (1) Berry received no benefit in exchange for the initial interview; (2) Thompson should not have exposed his client to the polygraph without first determining he could pass; and (3) the effect of the interview was to deprive Berry of the opportunity to require the prosecution to meet its burden of proof of facts as to the real estate fraud, depriving him of a meritorious defense -- lack of criminal intent.

FACTS - THE TRIAL

There were 12 transactions. On each occasion, a man telephoned a North County real estate office offering to sell vacant lots in North County San Diego. The caller always wanted a quick cash sale and instructed the real estate agent to mail pertinent documents, the listing agreement, title reports and contracts in care of a fictitious attorney at various La Jolla mailing addresses. The real estate agent and the "seller" never met in person. The purported seller always was unable to provide a telephone number at which he could be reached; signed documents were returned by mail messenger. The true owners of the lots offered for sale had no knowledge that their lots were being offered for sale; they had not signed any documents authorizing a sale. Berry signed the names of many of the true owners and also signed names of

fictitious notaries on the documents. Faucher signed others.[2] At Berry's direction, Hull opened three mail service addresses in La Jolla using fictitious names. Berry provided Hull with the necessary cash and provided a list of names of those who might also expect to receive mail at these mail drops. The names given included actual owners of vacant lots.

Hull picked up mail from the mail service and delivered it to Berry. Upon receipt of the first message, Berry said "it is started."

Berry and Faucher met with a Mexican attorney, Gomez, in San Ysidro to discuss investing money in Mexico. They used false names, Clark and Fisher

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[2] Prosecution handwriting experts supplied this evidence as to the identity of the writers. The Secretary of State had no record of a notary in California with the name appearing on the documents.

respectively, during this meeting. At Berry's direction, Hull delivered two checks to Gomez in Mexico, a $32,000 check on the Souther transaction and a $37,000 check on the Lang transaction. These checks failed to clear because of forged endorsements. When Gomez later told Hull the checks would not clear because of fraud or forgery, Hull relayed the message to Berry who responded that everything was off.

Berry testified he was duped by Faucher into signing other peoples' names. Five witnesses described Faucher's penchant for the signing of names of others in real estate transactions. A former employer of Faucher had fired him for such activity. Berry had passed the exam for a real estate license and went to work for Faucher parttime. However, Berry did not demonstrate real estate experience and, while there, the company

developed economic problems. Faucher told him he needed assistance with some out-of-state investors who would be buying and selling property. Berry said he arranged the mail drops and signed the numerous documents at Faucher's request, believing Faucher had authority to sign the names. After Berry was arrested and released on bail, Faucher, Berry testified, called him to apologize. The jury disbelieved Berry, convicted him on all counts.

CONTENTIONS

Berry contends Thompson's pretrial representation was not that which could be reasonably expected of a reasonably competent attorney acting as a diligent advocate. (People v. Pope, 23 Cal.3d 412, 425.) Specifically, he claims Thompson led him on a "blind adventure" of cooperation with the prosecutor. After hearing evidence on the issue, the trial

court generalized to the effect there had in fact been an "attorney malfunction"[3] but denied Berry's pretrial motion to dismiss, reasoning that at best Berry would be entitled to a new trial -- but the case had not yet started; the entire matter was therefore "moot."

On appeal, Berry contends Attorney Thompson's ineffective assistance, bad advice pretrial, produced damaging admissions, leads to witnesses and disclosures of his defense and thereby impaired his ability to defend the action at trial. He argues Attorney Thompson's

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[3] The judge's conclusion on this precise issue is not as clear as Berry's appellate counsel sees it. Said the judge, "...if there was legal malpractice or ineffective representation by Mr. Thompson, ...it could not constitute the basis for a motion to dismiss...." Moreover, Thompson had not even been told "what the motion is about." In fairness, Thompson should have at least been afforded fundamental due process and should have been given the opportunity to review his own records of the case before testifying.

representation cost him a defense: the right to remain silent and put the prosecution to its proof. He asserts that dismissal is the only applicable remedy for the alleged deprivation of assistance of adequate counsel.

DISCUSSION

I

Under the Sixth Amendment to the United States Constitution, a defendant is entitled to have assistance of counsel for his defense and that right accrues as soon as the adversary proceedings have begun. (Massiah v. United States, 377 U.S. 201, 204-206 [84 S.Ct. 1199].) A defendant has rights under the Fifth Amendment against self-incrimination. Questioning of a suspect must cease if he "indicates in any manner and at any stage of the process that he wishes to consult with an attorney...." (Miranda v. State of Arizona, 384 U.S. 436, 444-445

[86 S.Ct. 1602].) The product of an interrogation can certainly affect the entire trial. (Hamilton v. State of Alabama, 368 U.S. 52, 54 [82 S.Ct. 157].)

The California Supreme Court has pointed out that "a substantial portion of the obligation counsel owes is not directly connected with the trial but involves investigation and advice at pretrial and posttrial stages." (People v. Pope, supra, 23 Cal.3d 412, 423.) To prove ineffective assistance of counsel, an accused must establish that the attorney "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (Id., 425.) And that "right is denied if trial counsel makes a critical tactical decision which would not

be made by diligent ordinarily prudent lawyers in criminal cases." (Id., 424.) Moreover, diligent counsel have "a '"duty to investigate carefully all defenses of fact and of law that may be available to the defendant"'" (id., at p. 425) and "'[c]ounsel should promptly advise his client of his rights and take all necessary actions to preserve them....'" (Ibid.)

Attorney Thompson's advice, strategy, is bottomed on his reliance upon Berry's continued protestation of innocence. Had Berry passed the polygraph test, the district attorney admits it would have been difficult to prosecute him. Had Berry been telling Thompson the truth concerning his lack of mens rea, then certainly his information relayed to the district attorney could have resulted in a dismissal or substantially reduced charges. Here Thompson had examined the

prosecution's evidence in part and had interviewed his client at length and presented the client with the options to be taken.

In multiparty criminal proceedings, competent defense counsel may consider at a very early stage of the processes -- many times before an indictment or information is forthcoming -- the choice of cooperation with the prosecution in view of obtaining leniency or dismissal or the alternative of stone walling -- fighting the charges every inch of the way even to the court of last resort. If the cooperation route is chosen, "singing" -- talking to the prosecution -- is commonly involved. This process may involve a giving of something of value; admission of possible guilt on the part of the defendant, offers of evidence to aid in establishing the guilt of a co-defendant. To argue -- as does appellate defense

counsel here -- that only after a quid pro quo is received, shall the client "talk" is to demonstrate an unfamiliarity with the nature of prosecutors. To expect any offer of dismissal, leniency, etc. before the prosecutor makes an appraisal of the evidence tendered is to be unrealistic.

Berry contended he was innocent -- based on lack of mens rea. He had convinced Thompson of his innocence in face of many admitted acts pointing to his guilt. Further, he was most willing to load the guilt on the back of his co-defendant. The timing of such an approach to the district attorney -- if it was to have any value -- was critical, for the first tattler to the district attorney's office may be the first with a claim on leniency. Here both defendants engaged in this race to disclaim guilt and shift blame. While Berry was first in time, he apparently had no substance with

which to bargain. To hold in such circumstances that a failure to complete all discovery of prosecution materials before this approach is attempted is to almost assure its failure as a strategy to gain a favor. Delay may foreclose opportunity.

In assessing counsel incompetency, we must also add Berry's present concession that his information "properly" conveyed could sometime "result in dismissal or substantially reduced charges." Berry argues (without fact base) that Attorney Thompson failed to communicate and negotiate the information "properly." It can be speculated with equal or greater vigor that Berry's inability to "properly" convince the deputy district attorney of his veracity caused the lack of an offer of leniency and dismissal. As is apparent from the evidentiary course of the trial, Berry had no facts with which to bargain. He

gave nothing to the deputy district attorney. Contrary to the trial court's generalization, we view the decision to cooperate or not to cooperate at this early stage of the proceeding as a tactical choice made within the spectrum of reasonable competence of a trial attorney.

II

With respect to the contention of lawyer ineffectiveness due to a failure to require the client to take and pass a pre-lie detector test before submitting to the prosecutor's polygraph machine, we note these salient factors: Berry admits the lie detector "has demonstrated an unfortunate capacity to record the psychological reactions of truthful subjects as deceptive responses, and an anomolous inability to mirror the falsehoods of unresponsive subjects or those knowledgeable of the various ways to beat the machine." The Deceptive Certainty of

the Lie Detector, 10 Hastings Law Journal (1958) 63. Furthermore the generally accepted premise is that the results of the lie detector tests themselves are not considered reliable enough to have probative value. (People v. Carter, 48 Cal.2d 737, 759; People v. Thornton, 11 Cal.3d 738, 763-764; People v. Cooper, 95 Cal.App.3d 844, 850; Aengst v. Board of medical Qality Assurance, 110 Cal.App.3d 275, 282.)

In People v. Adams, 53 Cal.App.3d 109, the defendant took a "unilateral" test from a polygraph of his own choosing before submitting to the opposition machine. Said the court:

> "We believe this seriously diminished the reliability of the test and rendered inadmissible the evidence it was designed to produce." (Id., at pp. 115-116)

and "the more times a person is tested the less reliable are the test results." (Id., at p. 118, fn. omitted.) In order

to second such views, we need not seek out psychiatric opinions but need only consult our common knowledge, common experience with respect to the vagaries of the human mind and emotions. Feelings of guilt or innocence arise from a thousand undetermined and deepseated (subconscious?) sources. The effect of a "friendly" or "hostile" polygrapher, the confidence that arises from the fact that the test results -- whatever they may be -- will not be used against the subject, the fear of the machine itself, each and all have an effect on the sweat glands, blood pressure and rate of breathing and the reliability of the polygraph test.

Experts opine that among the factors that can adversely affect the reliability of the polygraph test are the emotional upset of the subject, fatigue, drunkenness, drugs, bad physical or emotional condition, high blood pressure, low blood pressure,

hardening of the arteries, obesity, feeble-mindedness, amnesia, a psychotic condition, being a pathologic liar, lack of fear or concern at being caught in a lie, surreptitious nervous simulation, use of antiperspirants, hypnosis, extraneous noise or abnormal temperatures.

For this court to conclude that Attorney Thompson was guilty of lawyer incompetence for a failure to require Berry to pass the pretest lie detector test is, if some experts are correct, to cast doubt on or diminish the reliability of the second test. If Attorney Thompson (and appellate counsel) were knowledgeable of the state of the polygraph art, each would be aware that the results of the "friendly" and the unfriendly" polygraph tests may well be different. Passing (or failure) on the first test is no assurance against a contrary result on a later test.

An assertion of attorney incompetence to be successful needs some firm evidentiary base. We do not find it here. The failure to require Berry to submit to a pretest friendly polygrapher does not demonstrate lawyer incompetence.

We are not prepared, based on this record, to find a failure of effective assistance of counsel.

III

If we accept, arguendo, Berry's characterization of Thompson's efforts and concede that the first prong of the Pope test was met, yet another barrier precludes reversal of his conviction.

Berry generalizes, argues he gave up this meritorious defense: "the right to remain silent and to put the prosecution to his proof." All that is wrong with this contention is that it is not supported by facts. The prosecution was put to its proof -- 434 pages of testimony plus a

multitude of documents to establish Berry's guilt. The statements obtained from Berry pretrial were not in fact used at trial. Berry's "damaging forgery admissions" were not used. Proof of Berry's forged signatures, grantor and notary, was made not from Berry's admissions pretrial but by an expert on the questioned documents. The fact of a polygraph examination or its result were never revealed to the jury. Thus Berry's choice to testify cannot be seen a compelled act forced by earlier discussions with the prosecution.

The state of the evidence at the close of the People's case did not depend for proof of any critical fact upon Berry's pretrial dicussions; rather the People's independent evidence invited, almost compelled response. In such circumstance, the trial attorney cannot be faulted for putting his client on the stand. Berry's protestations of innocence were based upon

(1) a lack of mens rea and (2) that some other defendant possessed the guilty intent. This was his defense posture both before and during trial. He was not believed pretrial by the prosecutor and -- from the verdicts -- not by the jury.

Berry points to none and we can find no meritorious defense that was lost or precluded by the criticized pretrial discussion or the lie detector test given.

In substance Berry seeks reversal of his conviction after an eminently fair trial, without a showing of any prejudice. Unless irregularities in the pretrial process are "jurisdictional in the fundamental sense" (People v. Pompa-Ortiz, 27 Cal.3d 519, 529), they should be reviewed under the appropriate standard of prejudical error and should require reversal only if the defendant can show he was deprived of a fair trial or otherwise suffered prejudice as a result of the

error pretrial. (Ibid; People v. Chavez, 26 Cal.3d 334, 344-348.) Berry cites us to no facts showing prejudice. The "per se" rule of reversible error is not applicable here.

Judgment affirmed.

CERTIFIED FOR PUBLICATION.

STANIFORTH, J.

WE CONCUR:

COLOGNE ,Acting P.J.

WIENER, J.

APPENDIX "B"

RECEIVED JUL 6 1981

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 1 1981

I have this day filed Order

HEARING DENIED

In re: 4/Crim *No.* 11663

People

vs.

Kenneth R. Berry

Respectfully,

Clerk